

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

**REPLY COMMENTS OF VYVX, INC.**

Vyvx, Inc. ("Vyvx"), by its attorneys, submits these reply comments in connection with certain petitions seeking reconsideration (or in some instances clarification) of the Commission's Report and Order in the above-captioned matter, FCC 97-157 (released May 8, 1997) ("Report and Order" or "Order"). Vyvx has a particular interest in those aspects of the Order affecting satellite and earth station operations. Vyvx supports the comments of those parties who demonstrate that clarification is needed on these points. Vyvx opposes the comments of parties who would deny carriers the right to recover contribution obligations from customers, including from customers receiving service under preexisting term contracts.

**I. THE COMMISSION SHOULD CLARIFY ITS ORDER WITH RESPECT TO SATELLITE ACTIVITY.**

**A. Non-Telecommunications Satellite Activity.**

Several petitioners and commenters have demonstrated the need for clarification of the treatment of satellite-related activity in the Report and Order.

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In general these positions are not challenged. The only exception comes from a few parties who briefly and glibly assert that anyone and everyone should contribute to the universal service program. 1/

These parties, however, do not address the important points made in the petitions regarding satellite activity. First of all, Vyvx agrees with GE Americom that it is important to distinguish between the different lines of business of a communications company, some of which may relate to telecommunications, and some of which may not. Thus, the provision of network equipment, including the leasing and management of that equipment, is not the same thing as the provision of “telecommunications” -- activity specifically defined in the Telecom Act as the transmission of information “between and among points specified by the user.” 2/

Vyvx or its affiliates engage in a various non-telecommunications activity, including the provision of customer premises equipment, switches, and most relevant here, bare satellite space segment or earth stations. In each case the customer uses these network elements, generally along with others obtained

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1/ See, e.g., Bell Atlantic Comments at 8 (listing satellite petitioners as among a “parade of telecommunications service providers” but not addressing the actual points made in the petitions regarding the products sold).

2/ As Loral notes in its comments, “communications” is defined separately in the Telecom Act. See Loral Comments at 8. Thus, a firm can engage in “communications” without also engaging in “telecommunications” subject to Section 254(d).

elsewhere, to design and operate a transmission path -- that is, to engage in “telecommunications.” But Vyvx or its affiliate is not itself providing telecommunications. It is only providing one of the elements needed by the customer to do so itself. In these circumstances Vyvx is not a contributor to universal service; the transmitting customer is the party to which the obligation attaches. 3/

Vyx agrees with other parties that it is important for the Commission to respect the statutory distinction between an activity that constitutes “telecommunications” and one that does not. The Report and Order appears to do so, but Vyvx agrees that clarification is important on this critical point.

#### **B. Non-Common Carrier Satellite Telecommunications.**

Other parties also are correct that clarification is appropriate regarding the exclusion of non-common carrier satellite telecommunications from a contribution obligation. The Order expressly states that “satellite and video providers must contribute to universal service only to the extent that they are providing interstate telecommunications services” Order at para. 781. The Order also makes clear that “telecommunications services” are common carrier services. Id. at 783.

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3/ The Commission has excused parties engaged in telecommunications from contributing to the extent that they transmit only their own information. This is often the case for parties using satellites. But the exemption for such internal use obviously does not mean that any obligation then attaches to providers of the equipment used by the “telecommunicating” party.

Apparently some confusion has arisen because elsewhere in the Order the Commission includes the provision of non-common carrier “telecommunications” as activity subject to contribution. Id. at para. 796. However, the Commission also “reiterates” that this paragraph does not modify the special rule created earlier limiting satellite and video contribution to common carrier “telecommunications services.” Id.

This result is entirely appropriate. Non-common carrier satellite telecommunications involves individual arrangements for specialized purposes. These arrangements are not connected to the public switched telephone network. In Vyvx’s case they involve distribution of video, often on a point-to-multipoint basis. In short, non-common carrier telecommunications has no relationship to the PSTN, and benefits in no way from universal service activity, anymore than do cable systems, OVS providers and other distributors of video content.

Vyvx considers the Report and Order clear that only common carrier satellite service revenues are to be considered in the context of universal service. Nevertheless, we would not oppose further clarification of this point as has been requested here.

## **II. THE COMMISSION SHOULD AFFIRM ITS DECISION TO ALLOW MODIFICATION OF EXISTING CONTRACTS FOR RECOVERY OF CONTRIBUTION OBLIGATIONS FROM CUSTOMERS.**

The Commission should reject petitions from those parties who argue that service providers should not be able to reopen term contracts to pass through

universal service contributions. As stated by the Commission, the new fund creates an expense that the providers could not anticipate at the time of execution of the contract. This expense does not arise from any decision or action of the provider; it is a new charge imposed by the government to serve public policy interests. As such, providers must be able to reopen term contracts to the extent necessary to include the expense of the contribution obligations into their rates.

Vyvx would urge the Commission to clarify that its statement that "...this finding [that changes to existing contracts are warranted to reflect the new business cost of universal service contributions] is not intended to preempt state contract law." <sup>4/</sup> The Commission here obviously intended to clarify that state law is only preempted to the extent necessary to permit recovery of the new contribution expense. Further clarification of this point would be helpful in forestalling unnecessary disputes and litigation among customers and carriers.

The Commission should specifically reject the arguments of a few parties that reopening of contracts should not be allowed. These parties are trying to shift the contribution burden to future customers, or alternatively trying to make the carrier bear the charge without reimbursement. Neither result is equitable. This issue is particularly significant for companies such as Vyx who draw a significant percentage of their revenues from long term contracts. The cost-causer for any contribution burden we face related to those contracts is the customer. It is

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<sup>4/</sup> Order, para. 851.

unfair, and potentially impossible for us to increase rates to new customers to make up this large shortfall. The Commission's ruling equitably spreads out the burden of the new fund, and avoids a potentially unlawful taking.

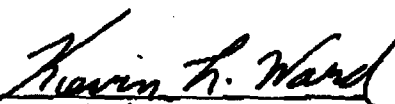
To the extent that the Commission is sympathetic to the complaints of the petitioning customers, the only appropriate remedy would be to excuse from contribution revenue received under term contracts in existence prior to completion of reconsideration here. Vyvx anticipates that such a decision would have a trivial impact on the overall size of the universal service revenue base. Even that impact would by its terms lapse as contracts expire. This result would address the concerns of customers. But in no case should the Commission leave providers with a new expense and no ability to recover it.

#### CONCLUSION

For the reasons set forth above, the Commission should clarify the application of its universal service rules to satellite-related activity. The Commission should also reject calls to revise its finding that providers may reopen term contracts for the limited purpose of recovering new contribution expenses.

Respectfully submitted,

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September 3, 1997

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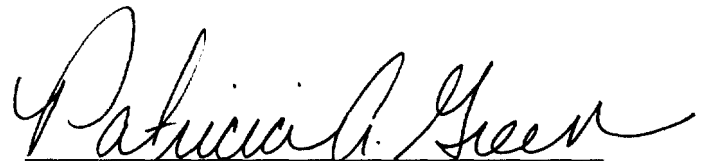
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